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IN THE
Supreme Court of the United States

OCTOBER TERM, 1970

No. 144

EUGENE GRIFFIN, ETC., ET AL.,

Petitioners,

v.

LAVON BRECKENRIDGE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

STEPHEN J. POLLAK
RICHARD M. SHARP

Shea & Gardner
734 Fifteenth Street, N.W.
Washington, D.C. 20005

GARY J. GREENBERG

Stroock & Stroock & Lavan
61 Broadway
New York, New York 10006

JOHN A. BLEVEANS

Washington Lawyers' Committee
for Civil Rights Under Law
1025 Fifteenth Street, N.W.
Washington, D.C. 20005

Attorneys for Petitioners

(i)

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Mississippi (A. 23-24)¹ is unreported. The opinion of the United States Court of Appeals for the Fifth Circuit (A. 27-44) is reported below at 410 F.2d 817.

JURISDICTION

Petitioners appealed from a judgment of the district court dismissing their complaint (A. 25, 26). The judgment of the court of appeals affirming the dismissal was entered on April 29, 1969 (A. 45). The petition for a writ of certiorari

¹The Appendix filed May 28, 1970, in this case is cited herein as "A." plus the page reference.

was filed on May 31, 1969, and granted on May 4, 1970. Simultaneous with the grant of the petition, the Court granted petitioners' motion for leave to proceed *in forma pauperis*. (397 U.S. 1074, A. 46). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution:

AMENDMENT XIII

Section 1: Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2: Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . . .

Section 5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Federal Statute:

42 U.S.C. 1985(3)

If two or more persons in any State or Territory conspire ~~to~~^{or} go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

QUESTIONS PRESENTED

Whether 42 U.S.C. 1985(3) reaches a private conspiracy to deprive persons on account of their race of equal protection of the laws and equal privileges and immunities under the laws as those terms are used in that statute.

Whether Congress possessed the power to enact 42 U.S.C. 1985(3) as so construed.

STATEMENT

Within a month after James Meredith was shot on the highway near Hernando, Mississippi, in the course of his "march against fear" from Memphis to Jackson,² petitioners—four blacks from Kemper County, Mississippi—were riding on federal, state and local highways visiting friends and doing errands (A. 4-5). R. G. Grady of Memphis, Tennessee, who owned and operated a car presumably bearing out-of-state tags, provided petitioners' transportation (A. 4). Petitioners' travels were abruptly halted by the respondents—Lavon and James Breckenridge, two white adults of Kemper County, Mississippi (A. 4-5). These men mistook the alien, R. G. Grady, for a civil rights worker, and, pursuant to plan, drove a truck into the path of Grady's oncoming car (A. 5). The Breckenridges then forced Grady and his black passengers from the car (A. 5). At least one of the Breckenridges, probably Lavon, held the travelers at bay with firearms; and James Breckenridge, amidst threats of murder, clubbed Grady and each of the petitioners about their heads (A. 5-6).

The Breckenridges perpetrated these acts as part of a conspiracy to prevent petitioners and other Negroes—

through such force, violence and intimidation, from seeking the equal protection of the laws and from enjoying the equal rights, privileges and immunities of citizens under the laws of the United States and the State of Mississippi, including but not limited to their rights to freedom of speech, movement, association and assembly; their right to petition their government for redress of their grievances; their rights to be secure in their person and their homes; and their rights not to be enslaved nor deprived of life and liberty other than by due process of law. [A. 5]

²*Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on The Judiciary*, 89th Cong., 2d Sess., p. 116 (1966); *Report of The National Advisory Commission on Civil Disorders*, p. 110 (1968).

As a result of this episode petitioners³ filed the complaint in this case alleging, in principal part, violations of 42 U.S.C. 1985(3) and demanding compensatory and punitive damages. On respondents' motion Federal District Judge Dan M. Russell, Jr., dismissed the complaint citing this Court's decision in *Collins v. Hardyman*, 341 U.S. 651 (1951).⁴ The Court of Appeals for the Fifth Circuit, notwithstanding "serious doubts as to . . . [the] continued vitality" (A. 38) of *Collins v. Hardyman* were disapproved and if § 1985(3) were held to embrace private conspiracies to interfere with rights of national citizenship" (footnote omitted) (A. 43).

SUMMARY OF ARGUMENT

This case raises the question whether in a damage action brought under Section 2 of the Ku Klux Klan Act of April 20, 1871, 17 Stat. 14, 42 U.S.C. 1985(3), plaintiffs must allege and prove that a conspiracy to deprive them of "equal protection of the laws, or of equal privileges and immunities

³Petitioners Eugene Griffin, Renea Johnson, and Lonnie Chamberlin are minors suing by their next friends. Petitioner Ted Coleman is an adult suing in his own right (A. 4).

⁴Respondents moved to dismiss because petitioners had filed a similar cause of action against them in the Circuit Court of Kemper County (A. 14). The district court did not rely on this in dismissing the complaint, nor did the court of appeals in affirming. That, we submit, is as it should be. This Court has said with respect to 42 U.S.C. 1983 that the "federal remedy" is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe v. Pape*, 365 U.S. 167, 183 (1961); *McNeese v. Board of Education*, 373 U.S. 668, 674 (1963). Moreover, lower courts have applied that principle in cases based on Section 1985(3). *Dodd v. Spokane County, Washington*, 393 F.2d 330, 334 (9th Cir. 1968); *Powell v. Workmen's Compensation Board of N.Y.*, 327 F.2d 131, 135 (2d Cir. 1964). See *Scolnik v. Winston*, 219 F. Supp. 836, 839 (S.D.N.Y. 1963), affirmed on other grounds *sub nom. Scolnick v. Hefkowitz*, 329 F.2d 716 (2d Cir. 1964).

under the laws" on account of their race was conducted "under the color of law." In *Collins v. Hardyman*, 341 U.S. 651 (1951), the Court read Section 2 as restricted by Congress to conspiracies carried on "under the color of law," but it did so because any other construction of the dormant Act would have raised grave constitutional questions over congressional power. Since then, decisions of this Court have answered these questions and affirmed the existence of the necessary power. Accordingly, petitioners seek to have the *Collins* decision reexamined and overruled so that Section 2 of the Act may be given its natural coverage.

I

On its face, Section 2 plainly reaches private or unofficial conspiracies. It identifies the subjects of its coverage as "two or more persons in any State." In sharp contrast with Section 1 of the Act, now codified in 42 U.S.C. 1983, Section 2 does not limit its subjects to those who act "under color of any law." Indeed, the statute speaks of those who "go in disguise upon the public highway" rather than those who act in official capacities. As this Court put it, in *United States v. Harris*, 106 U.S. 629, 637 (1883), the section "by its terms" protects against invasions "by private persons."

The legislative history does not evince a congressional purpose requiring that the Ku Klux Klan Act be read in a restrictive fashion. Section 2 of the Act, to be sure, evoked a storm of controversy, but to opponent and proponent alike it was clear that the principal purpose of the Act was to reach private conspiracies based on race, especially the conspiracies of the Klan.

The substantive rights protected from such conspiracies are, in the statute's words, "equal protection of the laws" and "equal privileges and immunities under the laws." The legislative history makes clear that Congress, by these terms, sought to protect rights of national and state citizenship.

Thus, the statute secures the rights respondents conspired to infringe—petitioners’ “equal rights, privileges and immunities . . . under the laws of the United States and the State of Mississippi . . .” (A. 5).

II

In order to avoid difficult constitutional questions, *Collins* construed Section 2 of the Ku Klux Klan Act to require “state action.” Recent opinions, however, indicate that Section 5 of the Fourteenth Amendment authorizes Congress to legislate against private action in order to preserve and secure Fourteenth Amendment rights. Thus, in *Katzenbach v. Morgan*, 383 U.S. 641 (1966), the Court held that Congress has the power to create substantive rights under the enforcement provisions of Section 5. In *United States v. Guest*, 383 U.S. 745, 761, 774 (1966), six justices, in concurring opinions, stated that Congress may legislate directly against private conduct in order to secure Fourteenth Amendment rights.

Moreover, the Congress’ authority under Section 2 of the Thirteenth Amendment has been more fully fleshed out since the decision in *Collins*. As a result of the decision in *Jones v. Mayer Co.*, 392 U.S. 409 (1968), it is clear that Congress has the power to define and proscribe those activities of private individuals that perpetuate the vestiges of slavery. While the precise limits of this power are as yet unknown, it at least includes the power to protect a man’s freedom “to go and come at pleasure.” *Id.* at 443.

Finally, many of the rights infringed in this case are rights of national citizenship. As to them, Congress derives authority to legislate from sources other than the Thirteenth and Fourteenth Amendments. “Every right, created by, arising under, or dependent upon the Constitution, may be protected and enforced” by Congress. *In re Quarles*, 158 U.S. 532, 535 (1895). And because Congress’ power with respect to these rights does not stem from the Fourteenth Amend-

ment, there can be no real question that its legislation can bear directly on private individuals. *United States v. Guest*, 383 U.S. 745, 759-60 n. 17 (1966). See *Twining v. New Jersey*, 211 U.S. 78, 97 (1908).

The burden of our argument, then, is that recent opinions of this Court construing the enabling provisions of the Thirteenth and Fourteenth Amendments indicate that Congress has the power to secure the values guaranteed by those Amendments from private as well as public infringement. Moreover, Congress enjoys similar powers with respect to the rights of national citizenship. In light of this, we submit that there was ample basis for the enactment of Section 1985(3), so that the Act can now be given its natural reading without fear of running afoul of the Constitution.

ARGUMENT

I. SECTION 1985(3) REACHES UNOFFICIAL CONSPIRACIES OF THE NATURE ALLEGED BY PETITIONERS.

A. Introduction

The Court below affirmed the judgment dismissing petitioners' complaint because it believed this Court's decision in *Collins v. Hardyman*, 341 U.S. 651, compelled that result.

In *Collins* three Justices (Burton, Douglas and Black JJ.) construed Section 1985(3) to prohibit private conspiracies, as we do in the case at bar. A majority of the Court, however, focused on the word "equal," and stated that under Section 1985(3) a conspiracy to deprive one of "equal protection" or "equal privilege and immunities" required "some manipulation of the law or its agencies to give sanction or sanctuary for doing so."⁵ 341 U.S. at 661. This

⁵The statute, in part, reads: "If two or more persons in any State or Territory conspire or go in disguise on the highways . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, . . . the party so injured or deprived may have an action for the recovery of damages . . ." 42 U.S.C. 1985(3).

interpretation, in our view, warrants re-examination, particularly in light of recent decisions of this Court fleshing out congressional authority under the Thirteenth, Fourteenth and Fifteenth Amendments and giving civil rights legislation of the Reconstruction Era its natural coverage.

When this Court decided *Collins* in 1951, civil rights legislation protecting citizens from wrongs perpetrated by individuals raised "constitutional problems of the first magnitude." 341 U.S. at 659. The Court, however, as it thrice stated, 341 U.S. at 655, 661, 662, avoided these constitutional problems with its construction of the statute. But, the statutory construction hardly seems to have been independent of the constitutional issues in the case. As the lower court ventured, "The Court was probably led to this result by its doubts as to the constitutionality of the statute, yet it based its decision not on constitutional grounds, but upon a construction of the language itself" (A. 36).⁶

Furthermore, the Court's reluctance to grapple with the constitutional problems lurking in *Collins*, evidently was compounded by its historical view of the statute. The Court characterized the Act as one that (1) had "long been dormant" and (2) was "among the last of the reconstruction legislation to be based on the 'conquered province' theory. . . ." 341 U.S. at 656.

Since 1951, this Court has answered the difficult problems lurking behind the *Collins* decision. Indeed, as we develop in detail, *infra* pp. 22-27, the Court's opinions now indicate that the Thirteenth, Fourteenth, and Fifteenth Amendments empower Congress to protect the rights incorporated in those Amendments against invasion by States or individuals. Thus, the constitutional impediments that the

⁶In *Adickes v. Kress & Co.*, 398 U.S. 144, 165 n. 31 (1970), this Court noted that *Collins* effectively read "under color of law" into 1985(3) "in order to avoid deciding whether there was congressional power to allow a civil remedy for purely private conspiracies"

Court skirted in *Collins* no longer exist. The language of the statute can be given its natural meaning and full scope without constitutional impediment.

Furthermore, quiescence is no longer a reason for reading civil rights acts restrictively. *Jones v. Mayer Co.*, 392 U.S. 409, 437 (1968). Recent decisions demonstrate that these statutes should be accorded "a sweep as broad as . . . [their] language." *United States v. Price*, 383 U.S. 787, 801 (1966). In according such acts their full coverage the Court now examines the legislative history of the particular provision involved, its companion statutes, and the relevant events transpiring outside of the halls of Congress which put the legislation into proper perspective. *Id.* at 801-05; *Jones v. Mayer Co.*, 392 U.S. at 422-437.

Section 1985(3), when read as its companion statutes have been recently by this Court, does not require state action and therefore, *Collins*, at least in its broader aspects, should no longer be treated as the authoritative construction of the 1871 Act.

B. The Plain Words and Legislative History of Section 1985(3) Demonstrate That the Statute Reaches Unofficial Conspiracies.

Section 1985(3), we submit, prohibits those conspiracies of private individuals which would deny blacks equal protection of the laws and equal privileges and immunities. Before discussing the precise language of Section 1985(3) and its legislative history, however, we sketch briefly the framework of civil rights statutes that Congress had erected prior to enacting Section 1985(3).

At the outset of Reconstruction, Congress passed the Act of April 9, 1866, 14 Stat. 27. Section 1 of that Act gave Negroes the same rights as whites with respect to transferring and receiving real and personal property. Section 2 declared that it was criminal for anyone acting "under the color of any law . . . or custom" to deprive any person of

the rights secured by Section 1. Next, Congress enacted the "Enforcement Act" of May 31, 1870, 16 Stat. 140. Section 6 of this act levied criminal penalties against conspiracies "by two or more persons" to interfere with the exercise or enjoyment of "any right or privilege secured . . . by the Constitution." Then, by the Act of April 28, 1871—the "Ku Klux Klan Act"—Congress reinforced its 1870 legislation with remedial provisions for damages in civil actions and still other provisions proscribing conspiracies. 17 Stat. 13. Section 1 of the Ku Klux Klan Act permitted civil actions for damages against persons who "under the color of any law" deprive one of his statutory or constitutional rights. Section 2 meted out civil and criminal remedies against conspiracies "by two or more persons" to interfere with the enjoyment of one's right to equal protection of the laws and equal privileges and immunities under the law. The civil damage provisions of Section 2 of the Ku Klux Klan Act, now Section 1985(3) of Title 42, provide the basis for the petitioners' suit in the case at bar.

1. *The Plain Meaning of the Act.* Section 1985(3), by its plain terms, reaches private or unofficial conspiracies to deprive one of his rights to "the equal protection of the laws, or of equal privileges and immunities under the laws" This section begins with the words, "If two or more persons in any State or Territory conspire" Congress did not say that one or more of the conspirators must be a government agent or in league with a government agent in depriving one of equal protection or equal privileges and immunities. That situation, indeed, is recognized as a discreet conspiracy and especially covered in Section 1985(3) by independent disjunctive language—"If two or more persons in any State or Territory conspire [for various purposes] . . . or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . ." damages will lie (emphasis added). Thus, while conspiracies involving state authorities are contemplated by this very

provision, such conspiracies are only one of many types reached by the statute.

Furthermore, the statute, taken in its entirety, reveals that conspiracies under Section 1985(3) are not limited to arrangements involving public officials. As with two earlier civil rights statutes,⁷ Section 1 of the 1871 Act clearly limits its reach to state action by subjecting to civil liability "any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State" shall deprive another of his rights, privileges or immunities. This limitation, quite simply, just does not appear in Section 2 of the Act which is now 42 U.S.C. 1985(3).

The Act, moreover, applies to those who "conspire or go in disguise on the highway or on the premises of another. . . ." Of these words Justice Frankfurter said, "if language is to carry any meaning at all it must be clear that the principal purpose . . . was to reach private action rather than officers of a State acting under its authority. Men who 'go in disguise upon the public highway, or upon the premises of another' are not likely to be acting in official capacities." *United States v. Williams*, 341 U.S. 70, 76 (1951) (opinion of Frankfurter, J.).

Finally, in 1883, when the Court had before it a criminal prosecution under Section 2 of the Ku Klux Klan Act, it said that this section (then Section 5519 of the Revised Statutes)⁸ "as appears *by its terms*, was framed to protect from invasion by private persons, the equal privileges and immunities under the laws, of all persons and classes of persons." *United States v. Harris*, 106 U.S. 629, 637 (1883) (emphasis added). This, we submit, is the natural reading of Section 1985(3).

⁷ Act of April 9, 1866, 14 Stat. 27, § 2; Act of May 31, 1870, 16 Stat. 140, 144, § 17.

⁸ In *Collins*, 341 U.S. at 657, the Court stated that the "provision establishing criminal conspiracies [is] in language indistinguishable from that used to describe civil conspiracies . . ." now in Section 1985(3).

2. *The Legislative History of the Act.* The legislative history of Section 1985(3) confirms the fact that the statute "means what it says." *Jones v. Mayer Co.*, *supra*, 392 U.S. at 421-22. The court of appeals, in fact, stated that "[e]very indication in the legislative history of the period suggests that the Congressional reconstructionists intended to make the streets and highways safe for the lately freed from *private* as well as from public traducers" (A. 39-40) (emphasis added).

This statute was designed to curb the actions of private "armed bands of assassins," particularly the Ku Klux Klan. Cong. Globe, 42d Cong., 1st Sess., App. 73 (Rep. Blair); see also *id.* at App. 78 (Rep. Perry: "gangs of assassins"). The depredations of this group were rehearsed at great length in the debates as congressmen and senators spelled out a tale of what they viewed as a "pre-concerted and effective plan by which thousands of men are deprived of the equal protection of the laws." *Id.* at 459 (Rep. Coburn). See also, *e.g.*, *id.* at 321-22 (Rep. Stoughton); 412-13 (Rep. Roberts); 154-57 (Sen. Sherman); App. 100-10 (Sen. Pool). The Klan was depicted as interfering, by violence and threats of violence, with the exercise by Negroes of the civil rights granted and protected by the recent Amendments to the Constitution and the federal statutes designed to enforce those guarantees.

All the legislators understood that the statute they were enacting would have to provide remedies against the concerted, private action of the Klan with which the States were either disinclined or unable to cope. Representative Shellabarger's speech introducing the measure, *id.* at App. 67-71, made it clear that as initially conceived the bill was designed to remedy denials of constitutional and legal rights by direct federal sanctions against the perpetrators of offenses. Moreover, throughout the legislative consideration of the bill and amendments to it, this understanding remained and was

made express by opponent and proponents alike.⁹ For example, Representative Shanks of Indiana declared (*id.* at App. 141):

I do not want to see it so amended that there shall be taken out of it the frank assertion of the power of the national Government to protect life, liberty, and property, irrespective of the act of the State.

The Court in *Collins* did not deal with the legislative history other than to concede that this Act was fashioned against the Ku Klux Klan (341 U.S. at 662). Moreover, in focusing on the word "equal" in the phrases "equal protection" and "equal privileges and immunities" to read a requirement of state action into the law (341 U.S. at 661, 662), it construed the Act in a manner that at best is unsupported by legislative history and more likely is contrary to the legislative history.

As originally introduced, the proposed statute did not speak in terms of "equal" protection or "equal" privileges and immunities, but rather protected persons against acts in "violation of the rights, privileges, or immunities of any person to which he is entitled under the Constitution and laws of the United States." Cong. Globe, 42d Cong., 1st Sess. 317. Three conflicting points of view as to the proper scope of the statute developed in response to the bill. The first group favored the proscription of all conspiracies which infringed those rights of federal citizenship arising out of the relationship between the citizen and the federal government. *Id.* at 382-83 (Rep. Hawley); 382, 478, App. 69 (Rep. Shella-

⁹See, e.g., the statements of those in favor of the measure: Cong. Globe, 42 Cong., 1st Sess., App. 81-86 (Rep. Bingham), 476 (Rep. Dawes), 481-82 (Rep. Wilson), 485 (Rep. Cook), App. 251 (Sen. Morton), 501-02 (Sen. Frelinghuysen), and 691-92, 696-97 (Sen. Edmunds). The opponents of the measure, who saw in it a federal criminal code which would supplant state jurisdiction, *infra*, n. 10, had no doubt that the bill reached the actions of private conspirators: e.g., *id.* at App. 48 (Rep. Kerr), App. 208-10 (Rep. Blair), 429, 431 (Rep. McHenry), App. 248 (Sen. Thurman).

barger); 475-76 (Rep. Dawes); App. 83-85 (Rep. Bingham). The second suggested that Congress should legislate directly against individual deprivation of Fourteenth Amendment rights when widespread lawlessness rendered the state helpless to insure an even-handed enforcement of its own laws. *Id.* 485-86 (Rep. Cook); 607-08 (Sen. Pool). The third group urged that the Fourteenth Amendment authorized Congress to enact statutes regulating private conduct without regard to first determining that a significant breakdown in state law enforcement had occurred. *Id.* 334 (Rep. Hoar); 487 (Rep. Tyner).

The leadership, under the direction of Representative Shellabarger, introduced the amendment which brought the word "equal" into the statute and also provided the civil damage remedy. This was done in hopes of accommodating those who insisted on a measure designed to protect national citizenship and Fourteenth Amendment rights while placating the fears of some Republicans and Democrats that the measure might usurp the states' general police power and interpose a federal criminal jurisdiction over crimes by individuals against the general rights, privileges and immunities of others.¹⁰

That the addition of the word "equal" was not intended to import a state action limitation is made clear by the statement of Representative Poland, an earlier critic, who, in endorsing the amendment, stated (Cong. Globe, 42d Cong., 1st Sess. 514; emphasis supplied):

¹⁰See e.g., Cong. Globe, 42d Cong., 1st Sess. 371-74 (Rep. Archer); App. 110-13 (Rep. Moore); App. 113 (Rep. Farnsworth); App. 134-39 (Rep. McCormick); App. 149-50 (Rep. Garfield); 75-78 (Sen. Trumbull).

... I do agree ... if a State make proper laws and have proper officers to enforce those laws, and *somebody* undertakes to step in and clog justice by preventing the State authorities from carrying out this constitutional provision [the Fourteenth Amendment], then I do claim that we have the right to make such interference an offense against the United States; *that the Constitution does empower us to aid in carrying out this injunction*, which, by the Constitution, we have laid upon the States, that they shall afford the equal protection of the laws to all their citizens. *When the State has provided the law, and has provided the officer to carry out the law, then we have the right to say that anybody who undertakes to interfere and prevent the execution of that State law is amenable to this provision of the Constitution, and to the law that we may make under it declaring it to be an offense against the United States.*

Furthermore, when the bill reached the Senate in its amended form, Senator Pool, (who had authored Section 6 of the 1870 Enforcement Act, now 18 U.S.C. 241, which does not require state action) stated in support of the bill (Cong. Globe at 608):

... Congress must deal with individuals, not states. It must punish the offender against the rights of the citizen; for in no other way can protection of the laws be secured and its denial prevented.

And, as the Court noted in *Adickes v. S. H. Kress & Co.*, 398 U.S. at 165, Senator Thurman, one of the leaders of the opposition, claimed that Section 2 of the Act, unlike Section 1 which required state action, was unconstitutional because it penalized private conspiracies.

Except perhaps for the views of Representative Shellabarger, the most influential statement of position, and the one for that matter which probably embodied the congressional intent concerning the statute as finally passed, was that of Representative, later President, Garfield. While Garfield

denied the existence of congressional power to "legislate directly" for the protection of persons within the States. Cong. Globe, 42d Cong., 1st Sess., App. 151, he acknowledged that Congress had the power to enforce the protections of Section 1 of the Fourteenth Amendment under the fifth section by making it an offense against the United States for any person, whether official or private, to invade the rights of citizens or by threats of violence, or intimidation, to deprive him of his rights. Thus, the enforcement of equal protection, as well as of the general peace of the community, was left to state authorities. However, when such authorities, either directly, or indirectly by a failure to act against those who would interfere with an individual's exercise of his constitutional rights, deny equal protection, "Congress was empowered to step in and provide for doing justice to those persons who are thus denied equal protection." *Id.* It was Garfield's view that the Fourteenth Amendment compelled the States to open their facilities to all on an equal basis. The States could not affirmatively act to foreclose the use of such facilities by Negroes. Beyond that, moreover, the States had a duty to insure that in fact their facilities were open to all on an equal footing even if this required the States to act against those individuals who would seek to keep the black man out. In the face of a failure of a State to afford such affirmative protection, Congress, in Garfield's view, was empowered to legislate directly against the individuals whom the State failed to punish. *Id.*¹¹

¹¹These same concerns continue even now to motivate federal action. In 1968 Congress strengthened the criminal protections for civil rights by enacting 18 U.S.C. 245. That statute applies to individual and conspiratorial actions, and it applies "whether or not" the actions are "under color of law." In support of this legislation, Attorney General Katzenbach testified that "What is equally-critically-necessary is to deal decisively with segregation enforced by lawlessness." Murders, bombings, and the like go "far beyond individual victims," for such acts generate "widespread intimidation and fear-fear of attending desegregated schools, using places of public accommodation, voting, and other activities. . . ." Nevertheless, "in some places . . . local officials either have been unable or unwilling to prosecute crimes of

Garfield announced his opposition to the original Shellabarger proposal for Section 2 of the statute but said he would give his "hearty" support to a redraft which incorporated his views. *Id.* The Garfield theory of the Fourteenth Amendment and the power it bestows upon Congress found widespread support in the debates¹² and seems to have influenced the final shape of the statute. When the statute was amended and passed, Garfield expressed his support and voted for the bill.

To summarize, in our view the legislative history manifests a positive congressional purpose to proscribe private conspiracies. But, we need not go so far. It is enough to say that the legislative history does not evince such a pervasive purpose to the contrary that the statute must be construed in a manner at odds with its plain meaning.

C. Section 1985(3) Protects Rights of National and State Citizenship

In the case at bar petitioners have alleged that the Breckinridges conspired to deny them "equal rights, privileges and immunities of citizens under the laws of the United States and the State of Mississippi." See Statement, *supra*, p. 4. In this section of our brief, we demonstrate that Section 1985(3) protects such rights. In later sections, we shall demonstrate that Congress has the constitutional authority to enact legislation that protects both types of rights from private racial conspiracies.

racial violence or to obtain convictions in such cases even where the facts seemed to warrant conviction." *Hearings Before the Subcommittee On Constitutional Rights of the Senate Committee on the Judiciary*, 89th Cong., 2d Sess. 88-90 (1966).

¹²See, e.g. Cong. Globe, 42d Cong., 1st Sess., 333-34 (Rep. Hoar); App. 85 (Rep. Bingham), 368 (Rep. Sheldon), 375 (Rep. Lowe), 448 (Rep. Butler), 459 (Rep. Coburn), App. 182 (Rep. Mercur), App. 251 (Sen. Morton), 501 (Sen. Frelinghuysen), 506 (Sen. Pratt), App. 229 (Sen. Boreman).

The original draft of the bill that became Section 2 of the Ku Klux Klan Act, secured the "rights, privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States." Cong. Globe 42d Cong., 1st Sess. 317 (1871). The Act that emerged from Congress, however, was, at least in a literal sense, broader than the original bill. The Act no longer contained words limiting the rights to those under the "Constitution and laws of the United States." The final Act secured "equal protection of the laws, or of equal privileges and immunities under the laws."

In changing the original bill Congress took as its text the Fourteenth Amendment which guarantees "equal protection" with respect to rights granted by the federal or the state government. Furthermore, in borrowing from the Fourteenth Amendment the phrase "privilege or immunities" Congress omitted the phrase "of citizens of the United States."¹³

Moreover, the explanation of this change in the original bill, as given by the floor leader, confirms the view that the Act secures equality of state and federal rights. In introducing the "equal protection" amendment to the bill, Representative Shellabarger stated that it was not intended to be a limitation on that part of the original bill which was "independent of the 14th amendment, referable to and clearly sustainable by the old provisions of the Constitution" Cong. Globe 42d Cong., 1st Sess. 478. Rather, the amendment was intended to resolve the "disputed grounds"—i.e., the extent to which Congress could act under the Fourteenth Amendment. In this regard, then, the amendment confined the reach of the law to "deprivations which attack the equality of rights of American citizens," *id.*, but it did not restrict the Act to rights granted only by the federal

¹³The distinction between privileges and immunities arising from federal law and those arising from state law was not crystallized until after this Act was passed. *Slaughter-House Cases*, 16 Wall. 36 (1872).

government or those granted only by the state government. Note, *Federal Civil Action Against Private Individuals For Crimes Involving Civil Rights*, 74 Yale L.J. 1462, 1469 (1965).

Finally, judicial construction of the Act indicates that it covers the rights of national citizenship as well as rights of state citizenship. In *Collins*, 341 U.S. at 659, the Court alluded to the fact that a constitutional decision in that case would raise issues as to the "content of rights derived from national as distinguished from state citizenship . . ."¹⁴ The dissenters in that case said that the right allegedly infringed was a First Amendment right and Congress, in Section 1985(3), had exercised its power to protect that national right. 341 U.S. at 663-64. So, too, the court below stated that it could not "discern why 'privileges and immunities under the laws' do not include privileges and immunities of national citizenship." (A. 40).¹⁵

In short, sound basis exists for reading Section 1985(3) to protect the rights of national as well as state citizenship.

¹⁴At the time this Act was before Congress, there was no consensus as to what rights were included in the rights of national citizenship. But one thing must have been clear—that the rights of national citizenship included the right to travel in interstate commerce, for the Supreme Court had so held four years before Section 1985(3) was passed. *Crandall v. Nevada*, 6 Wall. 35 (1867).

¹⁵In *United States v. Price*, 383 U.S. 787, 800-01 (1966), the Court said with respect to Section 1 of the Ku Klux Klan Act, that "Congress put forth all its powers . . . [T]his section dealt with Federal rights and with all Federal rights, and protected them in the lump. . ."; quoting *United States v. Mosley*, 238 U.S. 383, 387-88 (1915). The court below suggested that the legislative history of 18 U.S.C. 241, which was at issue in *Price*, is equally applicable to Section 1985(3). (A. 40)

II. CONGRESS IS EMPOWERED BY THE CONSTITUTION TO ENACT LEGISLATION PROVIDING DAMAGES TO PERSONS INJURED BY PRIVATE CONSPIRACIES TO DEPRIVE THEM OF EQUAL RIGHTS ON ACCOUNT OF RACE.

Having shown that Section 1985(3) reaches unofficial conspiracies to deprive persons of equal rights, privileges or immunities on account of race, we now consider whether this statute, as so interpreted, falls within the powers given the Congress by the Constitution. We urge that Congress possessed authority under the Thirteenth and Fourteenth Amendments to enact Section 1985(3) in its entirety and that, exclusive of the powers granted in these two Amendments, the recognized authority of the Congress to act to protect the rights of national citizenship affords a foundation for sustaining those parts of Section 1985(3) which are directed toward this objective.

Our submission in this case is limited to the type of group action—racial discrimination—which was quite clearly at the heart of the concerns leading to the adoption of the Thirteenth and Fourteenth Amendments.¹⁶ We do not address the question whether Congress possesses power to reach individual or group actions aimed at depriving persons of their rights under law for reasons other than race. That is neither raised by the facts of this case, nor by the statute which has as its purpose “to put the lately freed Negro on an equal footing before the law with his former master.” *Collins v. Hardyman*, 341 U.S. at 661.

¹⁶*Collins*, on the other hand, “dealt not with racial discrimination . . . but merely a ‘lawless political brawl.’” *Terry v. Adams*, 345 U.S. 461 (1953) (Clark, J., concurring).

A. The Powers Given Congress To Enforce the Thirteenth and Fourteenth Amendments Are an Ample Source of Authority for the Enactment of Section 1985(3).

1. *Congress is authorized by Section 5 of the Fourteenth Amendment to protect the exercise of rights secured by the Equal Protection Clause against deprivations by private conspiracies.*

In this section of our brief, we review the recent opinions of this Court which define the permissible limits of the powers given to Congress by the enabling section of the Fourteenth Amendment¹⁷ to give effect to the great purpose of this Amendment. We show that recent decisions of this Court make it clear that Section 5 of the Fourteenth Amendment authorizes Congress to pass laws establishing substantive rights in furtherance of the Fourteenth Amendment. Moreover, six justices of this Court in concurring opinions have indicated that the power of Congress to pass substantive laws under Section 5 of the Amendment includes the power to reach conspiracies that do not involve state action. On the basis of this, we submit that Congress was duly authorized by Section 5 of the Fourteenth Amendment to enact Section 1985(3).

This Court has now made it clear beyond peradventure that the enforcement clause of the Fourteenth Amendment permits Congress to go beyond the language in the substantive sections of that Amendment in order to protect minority groups in the enjoyment of their Fourteenth Amendment rights. In *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966), this Court said:

By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the

¹⁷Section 5 of the Fourteenth Amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I, § 8, cl. 18 The classic formulation of the reach of those powers was established by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat 316, 421: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

The Court concluded its study of Section 5 by holding that "[c]orrectly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Id.* at 651. See also *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (expressing in the same broad terms the scope of Section 2 of the Fifteenth Amendment); *Jones v. Mayer Co.*, 392 U.S. 409 (1968) (same as to Section 2 of the Thirteenth Amendment); *Everard's Breweries v. Day*, 265 U.S. 545, 558-59 (1924) (same as to Section 2 of the Eighteenth Amendment).

The holding of *Katzenbach v. Morgan* was foreshadowed by the opinions delivered three months earlier in *United States v. Guest*, 383 U.S. 745, 762, 781-84 (1966). While the opinion of the Court in *Guest* did not reach the question, 383 U.S. at 755, six justices in concurring opinions declared that Section 5 of the Fourteenth Amendment authorizes Congress to punish private conspiracies that interfere with Fourteenth Amendment rights. Mr. Justice Clark, speaking for Justices Black and Fortas as well, stated (*id.* at 762):

[I]t is . . . both appropriate and necessary under the circumstances here to say that there can now be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights.

In a second opinion, Mr. Justice Brennan, with whom Chief Justice Warren and Justice Douglas concurred, reached a similar conclusion, saying (*id.* at 781-82):

My view as to the scope of §241 requires that I reach the question of constitutional power—whether §241 or legislation indubitably designed to punish entirely private conspiracies to interfere with the exercise of Fourteenth Amendment rights constitutes a permissible exercise of the power granted to Congress by §5 of the Fourteenth Amendment “to enforce, by appropriate legislation, the provisions of” the Amendment.

A majority of the members of the court expresses the view today that §5 empowers Congress to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state laws are implicated in the conspiracy. Although the Fourteenth Amendment itself, according to established doctrine, speaks to the State or to those acting under the color of its authority, legislation protecting rights created by that Amendment, such as the right to equal utilization of state facilities, need not be confined to punishing conspiracies in which state officers participate. Rather, §5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection. [Footnote omitted.]

Justice Brennan then concluded by stating (*id.* at 784):

Viewed in its proper perspective, §5 of the Fourteenth Amendment appears as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens. . . . And I can find no principle of federalism nor word of the Constitu-

tion that denies Congress power to determine that in order adequately to protect the right to equal utilization of state facilities, it is also appropriate to punish other individuals—not state officers themselves and not acting in concert with state officers—who engage in the same brutal conduct for the same misguided purpose. [Footnote omitted.]

Katzenbach v. Morgan and the concurring opinions in *United States v. Guest*, then, recognize the power of Congress under the Fourteenth Amendment to enact whatever substantive measures it deems necessary and appropriate to enforce the equal protection guarantee. Furthermore, they indicate that such statutes can properly be drawn to reach private conspiracies which seek, for discriminatory reasons, to deprive persons of the equal use of state facilities.¹⁸

Finally, there can be no doubt that 1985(3) is appropriate legislation. *Katzenbach v. Morgan*, 384 U.S. 641, 650. See *South Carolina v. Katzenbach*, 383 U.S. 301, 326. The statute, indeed, was drawn in substantially the same words as the Fourteenth Amendment, and Congress described it as "An Act to Enforce the Provisions of the Fourteenth Amendment . . . and for Other Purposes." 17 Stat. 13.

¹⁸In this brief we do not restate the arguments that evidently persuaded at least a majority of the Court in *Guest*. Those arguments are found at pages 18-52 of the Government's brief in *Guest*. No. 65, O.T. 1965.

2. *Section 2 of the Thirteenth Amendment authorizes legislation reaching acts done in furtherance of private conspiracies which impose and perpetuate the badges or incidents of slavery.*

A further source of Congressional authority to enact Section 1985(3) may be found in Section 2 of the Thirteenth Amendment.¹⁹ That section of the Amendment, as we show below, authorizes Congress to define and proscribe those activities of private individuals which perpetuate the vestiges of slavery, including deprivations of equal protection of the laws and equal privileges and immunities.

There can be no doubt that Congress, under Section 2 of the Thirteenth Amendment, can reach private conduct if the legislation is otherwise appropriate to securing the interests protected by the Thirteenth Amendment. In *Jones v. Mayer Co.*, 392 U.S. at 438, this Court again made that point:

It has never been doubted, therefore, "that the power vested in Congress to enforce the article by appropriate legislation" . . . includes the power to enact laws "direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not." [Citing *Civil Rights Cases*, 109 U.S. 3, 20, 23.]

Thus, the fact that § 1982 operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem.

The question of using Section 2 of the Thirteenth Amendment to sustain Section 1985(3), then, narrows to whether that statute is appropriate to the purposes of the Thirteenth

¹⁹Section 2 of the Thirteenth Amendment provides that "Congress shall have power to enforce this article by appropriate legislation."

Although this Court's decision in *Jones v. Mayer Co.*, 392 U.S. 409, was entered while this case was pending in the court of appeals, that court acknowledged but did not pass upon the issue of whether Section 2 of the Thirteenth Amendment empowered Congress to enact Section 1985(3). (A. 34 n. 14)

Amendment. In this connection the Court declared in *Jones* that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." *Id.*, 392 U.S. at 440. Under the enforcing clause of the Thirteenth Amendment, Congress was empowered to do "much more" than abolish slavery and "establish universal freedom." *Id.* at 439. It could, for example, guarantee the promise of freedom to black people to "'go and come at pleasure'" and the freedom "to buy whatever a white man can buy, [and] the right to live wherever a white man can live." *Id.* at 443.

We submit that if Congress could secure "at least this much" for the Negro under the Thirteenth Amendment, it could readily legislate against conspiracies having as their object the denial of equal protection of the laws and equal privileges and immunities of the former slaves because of their race. This Court in *United States v. Harris*, 106 U.S. 629 (1883), recognized as much. The Court, to be sure, ruled that the Thirteenth Amendment did not sanction the criminal portion of Section 2 of the Ku Klux Klan Act, but that ruling rested on the tenuous ground that this part of the statute was too broad because it went beyond freeing Negroes and reached whites as well. It is true that 42 U.S.C. 1985(3) (the civil part of Section 2 of the Act) does not, by its terms, speak only to Negroes, but, for that matter, neither does the Thirteenth Amendment. Whether or not the Act or the Amendment apply to people of other races, the fact remains that both of these instruments had as their purpose the securing of freedom for black people. As the Court put it in *Collins*, Section 1985(3) was intended "to put the lately freed Negro on an equal footing before the law with his former master." 341 U.S. at 661. Section 1985(3), then, is cast no more broadly than the Thirteenth Amendment, and its purpose is at one with that Amendment.

**B. THE POWER OF CONGRESS TO PROTECT
RIGHTS OF NATIONAL CITIZENSHIP IS
AN ALTERNATIVE SOURCE OF AUTHOR-
ITY FOR SECTION 1985(3).**

There is yet a third source for Congress' constitutional authority to enact Section 1985(3). As the court below put it, some of the constitutional rights asserted by petitioner under Section 1985(3) "are 'fundamental to the concept of our Federal Union' . . . [quoting *Guest*] and implicit in our form of republican government. It is well established that Congress has the power to legislate for their protection even against interference by private conduct" (A. 35-36). Thus, the court below indicated that the statute, as we construe it, is constitutional (A. 36).

We have urged above (*supra*, pp. 18-20) that Section 1985(3) was intended to and does afford protection for the exercise of rights enjoyed as a result of national citizenship. We have also concluded that, although no distinction was made at the time Section 1985(3) was enacted between the rights of national citizenship and the rights enjoyed as a result of state citizenship, the words of the statute protecting "privileges and immunities under the laws" are ample to protect the former.

The constitutional principle is now well established that rights of citizens arising out of their relationship with the federal government may be protected by federal statutes applying directly to private individuals. In the case of *In re Quarles*, 158 U.S. 532, 535, (1895), this Court made it clear that "[e]very right, created by, arising under, or dependent upon the Constitution, may be protected and enforced" as Congress deems proper. The catalogue of such rights was set forth by this Court in *Twining v. New Jersey*, 211 U.S. 78, 97 (1908):

Thus among the rights and privileges of national citizenship recognized by this court are the right to pass freely from State to State, *Crandall v. Nevada*, 6 Wall. 35; the right to petition Congress for a re-

dress of grievances, *United States v. Cruikshank*, *supra* [92 U.S. 542]; the right to vote for National officers, *Ex parte Yarbrough*, 110 U.S. 651; *Wiley v. Sinkler*, 179 U.S. 58; the right to enter the public lands, *United States v. Waddell*, 112 U.S. 76; the right to be protected against violence while in the lawful custody of a United States marshal, *Logan v. United States*, 144 U.S. 263; and the right to inform the United States authorities of violation of its laws, *In re Quarles*, 158 U.S. 532.

And, as the Court noted in *Twining*, the development of this catalogue of rights came about via the prosecution under federal laws of "individuals for conspiracies to deprive persons of rights secured by the Constitution of the United States . . ." 211 U.S. at 98.

The racial conspiracy described in petitioners' complaint was allegedly aimed at deprivation of a number of the rights catalogued in *Twining*. The facts described in the complaint insofar as they reflect on rights of national citizenship, however, especially show a conspiracy to deprive petitioners of the right to travel and its correlative, the right to use highway facilities. The cases indicate that the latter, as well as the former, is a right of national citizenship within the power of Congress to protect. In *United States v. Guest*, 383 U.S. at 759-60 n. 17, the Court noted that the "right to interstate travel is a right that the Constitution itself guarantees" and that right is "quite independent of the Fourteenth Amendment." In another passage the Court also suggested that right would encompass travel within the State insofar as it involved the "use of streets or highways in interstate commerce." 383 U.S. at 757, n. 13. Similarly, in *United States v. Williams*, the right to use the highways and other instrumentalities of interstate commerce was recognized as a right "arising from the substantive powers of the Federal Government"—under the Commerce Clause—"which Congress can beyond doubt constitutionally secure against interference by private individuals." 341 U.S. 70, 73, 77 (1951) (Opinion of Frankfurter, J.).

Furthermore, there is nothing in *Collins* that indicates that Section 1985(3), as applied to unofficial conspiracies to invade rights of national citizenship, would be beyond the power of the Congress under the Constitution. 341 U.S. at 662. Rather, the Court held only, as a matter of statutory construction, that the Act was not intended to apply to unofficial conspiracies. That conclusion, which we maintain was erroneous, *supra*, pp. 10-18, certainly does not stand in the way of a ruling that Section 1985(3), as applied to unofficial conspiracies, is within the constitutional authority of Congress to protect rights of national citizenship.

A word should be said here regarding the somewhat remote problem of separability of state and federal rights protected by Section 1985(3). If this Court finds that the Thirteenth and Fourteenth Amendments did not grant Congress the power to enact Section 1985(3) and if the Court further finds that Section 1985(3) protects rights of both state and national citizenship, then the question arises whether the Court may hold the statute or a portion of it constitutional insofar as rights of national citizenship are concerned.

In *Collins v. Hardyman*, 341 U.S. at 659, the Court adverted to the question of separability of the Act in its application to rights derived from national as distinguished from state citizenship, and noted that it had been decided "adversely to the plaintiffs in *Baldwin v. Franks*, 120 U.S. 678," with respect to the criminal portion of Section 2 of the 1871 Act, R.S. § 5519. The dissenters in *Collins*, however, found no bar to their position on this basis, and the court of appeals in that case, after giving the issue some consideration, 183 F.2d at 314, concluded that the statute could be limited to protecting only rights of federal citizenship. Such a reading of the statute, to save its constitutionality, would be similar to the reading given to 18 U.S.C. 241, by Mr. Justice Frankfurter in *United States v. Williams*, 341 U.S. 70 (1951).

Such a reading of the statute to encompass only federal rights would at least in part perpetuate the purposes of Congress (see pp. 18-20, *supra*). In the terms of *United States v. Jackson*, 390 U.S. 570, 585 (1968), and its antecedent, *Champlin Rfg. Co. v. Commission*, 286 U.S. 210, 235 (1932), "it is evident that the legislature would . . . have enacted those provisions within its power, independently of that which" is the invalid part. Accordingly, the Court should not "defeat the law as a whole." *United States v. Jackson*, 390 U.S. at 585.

To summarize, the enabling clauses of the Thirteenth and Fourteenth Amendments, as now interpreted, permit Congress to deal with private group actions on account of race aimed at depriving black persons of rights secured by the Thirteenth and Fourteenth Amendments. Likewise, Congress' power to protect the rights of national citizenship affords the authority to uphold Section-1985(3) insofar as it protects such rights from racially-based conspiracies. Thus, there is ample authority underpinning Section 1985(3), as we construe it.

CONCLUSION

For the foregoing reasons judgment of the court below should be reversed.

Respectfully submitted,

STEPHEN J. POLLAK

RICHARD M. SHARP

Shea & Gardner

734 Fifteenth Street, N.W.

Washington, D.C. 20005

GARY J. GREENBERG

Stroock & Stroock & Lavan

61 Broadway

New York, New York 10006

JOHN A. BLEVEANS

Washington Lawyers' Committee

for Civil Rights Under Law

1025 Fifteenth Street, N.W.

Washington, D.C. 20005

Attorneys for Petitioners